

Horizon House Developmental Services, Inc. and District 1199C, National Union of Hospital and Health Care Employees, AFSCME, AFL-CIO.
Case 4-CA-29830

December 19, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN
AND WALSH

On June 27, 2001, Administrative Law Judge Bruce D. Rosenstein issued the attached decision. The General Counsel and the Charging Party filed exceptions and supporting briefs.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

I. FACTS

The Respondent is engaged in the provision of health care and related services to mentally disabled individuals in Philadelphia, Pennsylvania. In 1997, the Union was certified as the exclusive bargaining representative of a unit of resident advisors within the Respondent's Bucks County division. Following the Union's certification, the parties entered into a collective-bargaining agreement, with effective dates from December 21, 1998, through September 30, 2000. Prior to the expiration of that contract, in June 2000,¹ the Union requested that the Respondent commence negotiations for a new collective-bargaining agreement. Although the parties attempted to schedule bargaining sessions, they ultimately never met for negotiations.

Also prior to the expiration of the parties' contract, and in anticipation of future negotiations, the Union requested certain information from the Respondent—including a recent payroll run, medical benefits information, and the number of regular and overtime hours worked by unit employees in the prior 12 months—as well as a "leave bank policy" referenced in the existing collective-bargaining agreement. The Respondent did not provide the Union with the requested information, although it did notify the Union that its request for the "leave bank policy" had been forwarded to the Respondent's counsel.

Several weeks after its information request, the Union additionally filed three class action grievances against the Respondent, alleging that supervisors were performing bargaining unit work, and that employee work schedules

had been changed without notice and had not been posted as required. In response, the Respondent sent a letter to the Union requesting that it provide the Respondent with specific details as to when the alleged contract violations had occurred. A representative of the Union, in turn, replied that all of the facts relating to the grievances would be set forth at the grievance hearing, and the parties subsequently had no further discussions or meetings concerning the grievances.

Also during the period of time preceding the expiration of the parties' collective-bargaining agreement (from approximately May through October), the Respondent convened several meetings during which management and supervisory personnel discussed the status of the Union and exchanged information regarding the employees' purported sentiments (i.e., employee disaffection) toward the Union. As a result of those meetings, the Respondent ostensibly determined that the employees no longer wanted the Union as their representative and on October 2 withdrew recognition from the Union.² Also on October 2, the Respondent issued to the unit employees a memorandum, which provided in pertinent part:

[A]s far as we can tell, most of you would rather not have a union at all and are completely happy to be left alone about the issue. Because of this, beginning October 2, 2000, Horizon House will try to have the union decertified. We do this because we want each of you to have the right to decide for yourselves, now, if you want to have a union or not.

Thereafter, on October 11, the Respondent filed an RM petition with the Board.³

Based on the events described above, the complaint alleges that the Respondent violated Section 8(a)(5) and (1) of the Act by withdrawing recognition and failing to bargain with the Union for a new collective-bargaining agreement, by failing to provide necessary and relevant information requested by the Union, and by failing and refusing to process grievances filed by the Union.

II. THE JUDGE'S DECISION

The judge concluded that the Respondent did not violate the Act by withdrawing recognition and refusing to bargain with the Union. The judge determined that testimony from the Respondent's Director of Human Resources and other supervisory personnel served to establish that the Respondent possessed a good-faith uncer-

² At this time, the unit consisted of 22-23 employees.

³ As a result of the Union's instant unfair labor practice charges alleging violations of Sec. 8(a)(5), the Regional Director dismissed the RM petition subject to reinstatement upon the disposition of the unfair labor practice proceedings.

¹ All dates referenced herein are in 2000, unless otherwise indicated.

tainty regarding the Union's majority status. The judge relied principally on his findings that (1) Home Coordinator Barbara Rossi testified that employees Morrison, DiYenno, and Moore had apprised her that the Union was not necessary and that it was unfair to be required to pay dues and not receive representation; (2) Home Coordinator Erica Mount testified that employees Thompson and Garglahn had complained to her about paying dues and not being represented by the Union; and (3) employee Thompson, the former union delegate (i.e., steward), had told several members of management "that the employees no longer wanted the Union to represent them" and that they were circulating a petition to that effect.

Having thus concluded that the Respondent was privileged to withdraw recognition from the Union, the judge determined that the Respondent did not violate the Act by refusing to provide information requested by the Union in preparation for negotiations. Finally, the judge concluded that the Respondent did not violate the Act by refusing to process the class-action grievances filed by the Union. The judge reasoned that the Union's admitted failure to respond to the Respondent's letter requesting additional information regarding the details of the alleged contract violations—together with the Union's failure to exercise its option to elevate the grievances to the next step of the grievance procedure—precluded a finding that the Respondent refused to process the grievances at issue. Accordingly, the judge dismissed the complaint in its entirety.

III. CONTENTIONS OF THE EXCEPTING PARTIES

Both the General Counsel and the Union contend that the judge misconstrued much of the testimony on which he relied in reaching the conclusion that the Respondent possessed a good-faith uncertainty of the Union's majority status such that the Respondent was justified in withdrawing recognition from the Union. The General Counsel and the Union assert that the record evidence cannot be reconciled with the judge's findings, and that the actual, limited evidence demonstrating employee opposition to the Union is insufficient to establish a good-faith uncertainty regarding the Union's status.

Therefore, the General Counsel and the Union assert, the Respondent's withdrawal of recognition from the Union violated Section 8(a)(5) of the Act. From that premise, the General Counsel and Union further aver that the judge additionally should have found that the Respondent violated the Act by failing to provide the requested information, which the Union sought in anticipation of negotiations, and which was presumptively relevant to the Union's discharge of its collective-bargaining responsibilities. Finally, the Union contends that, con-

trary to the judge's finding, the Respondent violated Section 8(a)(5) by refusing to process the Union's grievances.

IV. ANALYSIS

It is well established that the majority status of an incumbent union may not be challenged during the life of a collective-bargaining agreement (for a period of up to 3 years): there is an irrebuttable presumption that the union retains its majority status during the term of the contract. See *Auciello Iron Works v. NLRB*, 517 U.S. 781, 786 (1996). Following the expiration of a collective-bargaining agreement between an employer and incumbent union, however, the presumption that the union enjoys majority support becomes rebuttable. *R.J.B. Knits, Inc.*, 309 NLRB 201, 205 (1992). Pursuant to longstanding Board precedent—which was controlling at the time of the Respondent's withdrawal of recognition in this case—an employer can rebut the presumption and, accordingly, lawfully withdraw recognition from an incumbent union, if the employer demonstrates that the union has actually lost majority support, or that the employer possesses a good-faith doubt that the union retains its majority status. See *Celanese Corp.*, 95 NLRB 664 (1951).⁴

In *Allentown Mack Sales & Service v. NLRB*, 522 U.S. 359 (1998), the Supreme Court considered the issue of an employer's withdrawal of recognition based on a purported good-faith doubt of the union's majority status.⁵ The Supreme Court first clarified the standard under which an employer's withdrawal of recognition is examined. The Court instructed that the term "doubt" as used in the Board's good-faith doubt standard signifies "uncertainty," such that the relevant inquiry is whether the employer at issue "lacked a genuine, reasonable uncer-

⁴ During the pendency of this case, the Board in *Levitz*, 333 NLRB 717 (2001), reconsidered the circumstances under which an employer may lawfully withdraw recognition from an incumbent union. In that case, the Board overruled *Celanese* to the extent that it permitted an employer to withdraw recognition based on a good-faith doubt, and held that "an employer may rebut the continuing presumption of an incumbent union's majority status, and unilaterally withdraw recognition, only on a showing that the union has, in fact, lost the support of a majority of the employees in the bargaining unit." *Id.* at 725. Recognizing that many employers had likely relied on *Celanese* and its progeny in assessing whether they could properly withdraw recognition, however, the Board determined that it would not apply its holding retroactively, but rather would "decide all pending cases involving withdrawals of recognition under existing law: the 'good-faith uncertainty' standard as explicated by the Supreme Court in *Allentown Mack*." *Id.* at 729. Accordingly, that standard is the controlling standard for analysis in this case.

⁵ The Board in that case rejected the employer's claim that a good-faith doubt as to the union's majority status justified its withdrawal of recognition from the union and found that the employer violated Sec. 8(a)(5).

tainty about whether [the union] enjoyed the continuing support of a majority of unit employees.” *Id.* at 367. Applying this standard to the facts of the case, the Court then concluded that the Board had ignored or failed to accord proper weight to various evidence bearing on employee sentiment toward the union, and that due consideration of such evidence compelled the conclusion that the employer had reasonable, good-faith grounds to be uncertain about the union’s majority status. *Id.* at 371.⁶

Applying the “good faith uncertainty” standard articulated in *Allentown Mack* and explicated in subsequent Board decisions,⁷ we conclude, contrary to the judge, that the Respondent did not demonstrate that it possessed a good-faith uncertainty regarding the Union’s majority status.

In so concluding, we agree with the contentions of the General Counsel and the Union that the judge inaccurately characterized some of the testimony on which he relied in finding a good-faith uncertainty.⁸ For example, the judge relied on testimony by Home Coordinator Barbara Rossi. According to the judge, Rossi testified that employees Lucy Morrison, Karen DiYenno, and Tanisha Moore informed her that the Union was not necessary, that the employees were not receiving representation, and that it was unfair that the employees be required to pay dues without receiving representation from the Union.⁹ A review of the record, however, reveals the inaccuracy of the judge’s characterization of Rossi’s testimony. Rossi’s testimony does not demonstrate that *any* of the referenced employees complained that they were not receiving representation or that they were receiving inadequate representation relative to the dues they were paying. Rather, employee Morrison merely complained to Rossi regarding the difficulty of contacting the Union in connection with her receipt of a disciplinary memorandum. As to employee Moore, Rossi merely testified

that Moore had complained about being required to pay dues, when other employees were not so required.

In our view, the statements of employees Morrison and Moore do not establish a good-faith uncertainty as to whether they supported the Union. Neither Morrison’s nor Moore’s statement constitutes a direct expression of opposition to the Union. Further, in contrast to the statement of an employee in *Allentown Mack* that “he was not being represented for the \$35 he was paying,” we do not think the employees’ remarks here can fairly be read as even “statements of dissatisfaction with the quality of union representation,” which the Supreme Court indicated “can unquestionably be probative to some degree of the employer’s good-faith reasonable doubt.” *Allentown Mack*, 522 U.S. at 379–380. Rather, employee Morrison simply expressed frustration concerning her inability to reach the Union on a particular occasion. Employee Moore’s communication principally reflected her desire that her colleagues comply with their obligation to remit dues to the Union. Even if her comment could be read as an expression of her displeasure with paying dues, however, it still would not demonstrate a disinterest in union representation. See *R.J.B. Knits*, 309 NLRB at 206.

Only Rossi’s testimony regarding employee DiYenno’s comments to her could be construed as an indication of opposition to the Union. Rossi testified that DiYenno relayed to her a conversation with a group of employees concerning the need for a union in the past, and DiYenno purportedly responded that she was “not interested in unions and she doesn’t live in the past.”¹⁰ As DiYenno’s statement evidencing a disinterest in unions generally could call into question her support for the Union here, the judge properly considered DiYenno’s comment as evidence contributing to a good-faith uncertainty of the Union’s majority status.

An examination of the record further reveals that the judge also inaccurately characterized testimony from Home Coordinator Erica Mount. The judge found that Mount testified that employees Traci Thompson and Arthur Garglahn “complained to her about the necessity of

⁶ In reaching that conclusion, the Court relied on the following: (1) evidence of firsthand confirmed statements of opposition to the union by 7 of 32 unit employees; (2) the statement by an eighth employee that “he was not being represented for the \$35 he was paying”; (3) the statement by a night shift employee to a manager that the entire night shift did not want the union; and 4) the statement of an employee—who was a union steward and a member of the union’s bargaining committee—that if a vote were taken, the union would lose.

⁷ See, e.g., *Nova Plumbing, Inc.*, 336 NLRB No. 61 (2001); *Marion Memorial Hospital*, 335 NLRB 1016 (2001); *The Henry Bierce Co.*, 328 NLRB 646 (1999). Chairman Hurtgen dissented in *Nova* and *Marion*, and he did not participate in *Henry Bierce*. However, he agrees that Respondent has not shown a good-faith uncertainty here.

⁸ Accordingly, we need not, and do not, decide whether the facts as found by the judge would be sufficient to establish a good-faith uncertainty under *Allentown Mack*.

⁹ The judge did not find that each of the three employees complained of all three matters.

¹⁰ Rossi also testified that employee DiYenno subsequently complained to Rossi regarding her inability to get in contact with the Union in connection with her receipt of disciplinary action, and indicated that she “was going to make a complaint” because she felt that the Union was discriminating against her. However, DiYenno relayed this information to Rossi several months *after* the Respondent’s withdrawal of recognition from the Union. Accordingly, we do not rely on this evidence in determining the existence of a good-faith uncertainty on the part of the Respondent. See *Murrysville Shop ‘N Save*, 330 NLRB 1119 (2000).

paying dues and not being represented by the Union.”¹¹ The record, however, indicates that Mount allegedly received complaints from employees Arthur Garglahn and Linda DeJesus—not from employee Thompson¹²—to the effect that not all of the employees were paying dues because their dues cards had been lost and, additionally, that the staff did not want to have dues taken out of their checks. On cross-examination, however, Mount testified that Garglahn and DeJesus had complained about the fact that they had been asked to complete new dues cards because their original cards had been lost. Given Mount’s somewhat contradictory testimony regarding the complaints from employees Garglahn and DeJesus, the exact nature of the employees’ actual statements is unclear. However, we find that under any version of Mount’s testimony, the statements of employees Garglahn and DeJesus are not indicative of the employees’ support or lack of support for the Union. Even assuming that Garglahn and DeJesus relayed to Mount complaints that employees did not want to have dues taken out of their paychecks, the Board has consistently held that employees’ opposition to paying dues or to dues checkoff is irrelevant to the issue of their support for the Union. See *Hospital Metropolitan*, 334 NLRB 555, 556 (2001); *R.J.B. Knits*, 309 NLRB 206. Even less probative of the employees’ sentiments toward the Union, however, is Garglahn and DeJesus’ purported complaint that other employees were not paying their union dues. Garglahn and DeJesus’ irritation or concern that their fellow employees were not complying with their obligation to pay union dues—similar to employee Moore’s complaint discussed above—can hardly be viewed as an expression of discontent with the Union. Similarly, their complaint regarding the necessity of completing new dues cards merely reflects frustration with the administrative inconvenience they experienced. Neither statement evidences a lack of support for the Union or even dissatisfaction with the quality of the Union’s representation.¹³

¹¹ In the “Facts” section of his decision, the judge stated that Mount testified that employees Thompson and Garglahn “complained to her about the necessity of paying dues and *not being represented by the Union*”; in contrast, the judge in the “Analysis” section of his decision indicated that employees Thompson and Garglahn complained to Mount about “paying dues and *not being able to contact the Union*” (emphasis added).

¹² Regarding employee Thompson, Mount testified only that, sometime prior to Respondent’s withdrawal of recognition, Thompson made the innocuous statement that “when she would make calls [to the Union], it would be a while before she would get a response.”

¹³ Indeed, ironically, it may be that the employees’ complaints to representatives of the Respondent reflected the view that the Respondent was accountable for (and capable of rectifying) the loss of dues cards and the consequent failure of other employees to pay dues.

We additionally find no support in the record for the judge’s finding that employees Garglahn and Thompson complained to Home Coordinator Mount that they were not being represented by the Union. At most, the record reveals that Garglahn and Thompson indicated that they were experiencing difficulty in contacting the Union, consistent with the judge’s finding in the “analysis” section of his decision, see fn. 11, *supra*. In any event, however, the specific communications to which Mount referred occurred in April 2001 (Garglahn) and January 2001 (Thompson). As this evidence post-dates the Respondent’s withdrawal of recognition, it cannot properly be considered in support of a finding of good-faith uncertainty on the part of the Respondent. See *Murrysville Shop ‘N Save*, *supra*.

Finally, in finding that the Respondent had a good-faith uncertainty of the Union’s status, the judge improperly relied on ambiguous statements attributed to employee Thompson. Thompson served as the union delegate (steward) for the bargaining unit until January, at which time she resigned from the position. The record discloses that Human Resources Director Rita Kucsan testified that in January 2000 Thompson told her that “the Union didn’t make [a] difference” in terms of the Respondent’s policies and procedures, that the representation by the Union wasn’t worth the dues, that it was difficult to get in touch with the Union and, consequently, that “they” would be submitting a petition to remove the Union as their representative.¹⁴ Similarly, Program Director Betti Jo Murphy testified that Thompson had indicated to her in April that “they” were compiling a petition to show that they no longer desired union representation; Murphy further testified that, several months later, Thompson told her that “they” had filed such a petition with the Union.

These statements contrast sharply with objective evidence presented in prior cases in which the Board has relied on actual petitions declaring that unit employees no longer desire representation by a union as support for an employer’s good-faith uncertainty of the union’s majority status. Compare *Littler Diecasting Corp.*, 334 NLRB 707 (2001); *Levitz*, 333 NLRB 717 (2001). Here, the speculative and ambiguous nature of the comments about some purported petition precludes a finding of good-faith uncertainty based on those comments. First, there is no evidence to indicate that any employee petition ever actually came to fruition.¹⁵ More significant,

¹⁴ According to Kucsan, Thompson additionally told her that the petition would be filed sometime after July 2000, subsequent to the next scheduled wage increase.

¹⁵ Although Thompson purportedly told Murphy that “they” had filed the petition with the Union during the summer of 2000, Union

however, is the fact that both Kucsan and Murphy testified that they did not ask about, nor were they aware of, either the actual content of the petition or the number of unit employees who were purportedly involved in the preparation of the petition. Without some indication as to the number of unit employees who signed the alleged petition, the Respondent would have no basis for a good-faith uncertainty that a majority of the employees no longer supported the Union. See *Raven Government Services*, 331 NLRB 651, 651 fns. 3, 4 (2000) (finding that the employer's withdrawal of recognition was not justified by its reliance on hearsay evidence of a decertification petition, where the employer had never seen the petition and had no knowledge as to the petition's content or the number of employees who might have signed it). Accordingly, the statements attributed to Thompson could give rise to an uncertainty regarding only *employee Thompson's* support for the Union.¹⁶

Having examined all of the proffered evidence on which the judge relied in finding that the Respondent was privileged to withdraw recognition from the Union, we conclude that only two employee statements could contribute toward a good-faith uncertainty of the Union's status: (1) the statement of employee DiYenno that she was not interested in unions, and (2) employee Thompson's comments indicating her criticisms of the Union and her intent to file (along with unidentified others) a petition to remove the Union. We conclude that this limited evidence, consisting of statements from merely two of the approximately 22 unit employees, is insufficient to establish a good-faith uncertainty of the Union's majority status under *Allentown Mack*.¹⁷ Accordingly, we conclude that the Respondent's withdrawal of recognition

representative Maureen Bendig testified that the Union never received such a document. Additionally, although the Respondent's communications with Thompson occurred between January and July, the Respondent had never seen or received a copy of the alleged petition at the time it withdrew recognition in October, 3 to 9 months later.

¹⁶ The fact that Thompson subsequently was elected to the union bargaining committee in August, however, casts some doubt on that supposition. Nevertheless, we assume that given Thompson's earlier statements, the evidence as a whole could cause the Respondent to be uncertain as to her support for the Union. See *Levitz*, 333 NLRB *supra* (finding irrelevant the employer's failure to consider evidence from the union that assertedly contradicted the employee petition giving rise to the employer's good faith uncertainty, because "even if [the union's] evidence supported [its] assertion, it would simply have produced a conflict with the earlier petition. Thus, the Respondent could still reasonably have been uncertain about the union's majority status").

¹⁷ We find that the judge properly did not rely on the additional justifications proffered by the Respondent for its withdrawal of recognition, including, *inter alia*, the failure of a number of employees to authorize the deduction of dues, poor attendance at union meetings, failure of the employees to elect a union steward, and the declination by a number of employees of union representation at disciplinary meetings. No party has excepted to the judge's decision in this regard.

from, and refusal to bargain with, the Union violated Section 8(a)(5) and (1) of the Act. Further, as the Respondent in its answer to the complaint admitted that it failed and refused to provide the information requested by the Union and failed and refused to process the Union's grievances—in sole reliance on its assertion that the Union had lost its majority status—we conclude that the Respondent's actions in these matters constitute additional violations of Section 8(a)(5) and (1).

Finally, for the reasons set forth in *Caterair International*, 322 NLRB 64 (1996), we find that an affirmative bargaining order is warranted in this case as a remedy for the Respondent's unlawful withdrawal of recognition from the Union. We adhere to the view, reaffirmed by the Board in that case, that an affirmative bargaining order is "the traditional, appropriate remedy for an 8(a)(5) refusal to bargain with the lawful collective-bargaining representative of an appropriate unit of employees." *Id.* at 68.

In several cases, however, the U.S. Court of Appeals for the District of Columbia Circuit has required that the Board justify, on the facts of each case, the imposition of such an order. See, e.g., *Vincent Industrial Plastics v. NLRB*, 209 F.3d 727 (D.C. Cir. 2000); *Lee Lumber & Building Material v. NLRB*, 117 F.3d 1454, 1462 (D.C. Cir. 1997); and *Exxel/Atmos v. NLRB*, 28 F.3d 1243, 1248 (D.C. Cir. 1994). In the *Vincent* case, the court summarized the court's law as requiring that an affirmative bargaining order "must be justified by a reasoned analysis that includes an explicit balancing of three considerations: (1) the employees' Section 7 rights; (2) whether other purposes of the Act override the rights of employees to choose their bargaining representatives; and (3) whether alternative remedies are adequate to remedy the violations of the Act." 209 F.3d 738.

Although we respectfully disagree with the court's requirement for the reasons set forth in *Caterair*,¹⁸ we have examined the particular facts of this case as the court requires and find that a balancing of the three factors warrants an affirmative bargaining order.

(1) An affirmative bargaining order in this case vindicates the Section 7 rights of the unit employees who were denied the benefits of collective bargaining by the employer's withdrawal of recognition. At the same time, an affirmative bargaining order, with its attendant bar to raising a question concerning the Union's majority status for a reasonable time, does not unduly prejudice the Section 7 rights of employees who may oppose continued union representation because the duration of the order is

¹⁸ Chairman Hurtgen agrees with the court's requirement.

no longer than is reasonably necessary to remedy the ill effects of the violation.

Moreover, in addition to unlawfully withdrawing recognition from the Union, the Respondent failed and refused to provide information requested by the Union, and refused to process grievances relating to the terms and conditions of employment of the unit employees on whose behalf they were filed. These actions clearly signal to employees the Respondent's continuing disregard for their bargaining representative and would likely have a long-lasting effect.

(2) The affirmative bargaining order also serves the policies of the Act by fostering meaningful collective bargaining and industrial peace. That is, it removes the Respondent's incentive to delay bargaining in the hope of further discouraging support for the Union. It also ensures that the Union will not be pressured, by the possibility of a decertification petition or by the Respondent's withdrawal of recognition, to achieve immediate results at the bargaining table following the Board's resolution of its unfair labor practice charges and issuance of a cease-and-desist order.

(3) A cease-and-desist order, without a temporary decertification bar, would be inadequate to remedy the Respondent's violations because it would permit a decertification petition to be filed before the Respondent had afforded the employees a reasonable time to regroup and bargain through their representative in an effort to reach a collective-bargaining agreement. Such a result would be particularly unfair in circumstances such as those here, where the Respondent's unfair labor practices were of a continuing nature and were likely to have a continuing effect, thereby tainting any employee disaffection from the Union arising during that period or immediately thereafter. We find that these circumstances outweigh the temporary impact the affirmative bargaining order will have on the rights of employees who oppose continued union representation.

For all the foregoing reasons, we find that an affirmative bargaining order with its temporary decertification bar is necessary to fully remedy the allegations in this case.

AMENDED CONCLUSIONS OF LAW

1. The Respondent violated Section 8(a)(5) of the Act by withdrawing recognition from the Union on October 2, 2000, by failing to furnish necessary and relevant information requested by the Union on August 14 and 30, 2000, and by refusing to process grievances filed by the Union on behalf of unit employees on August 30, 2000.

2. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

The National Labor Relations Board orders that the Respondent, Horizon House Developmental Services, Inc., Philadelphia, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with District 1199C, National Union of Hospital and Health Care Employees, AFSCME, AFL-CIO as the exclusive representative of its bargaining-unit employees.

(b) Failing and refusing to provide information relevant and necessary to the Union as the collective-bargaining representative of the employees in the appropriate bargaining unit described below.

(c) Failing and refusing to process grievances concerning wages, hours, and other terms and conditions of employment of bargaining unit employees.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize and, on request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All full-time, regular part-time and substitute Resident Advisors II and III employed in the Bucks County, Pennsylvania Division of Horizon House, Inc., excluding all other employees including home coordinators, team coordinators, program specialists, guards and supervisors as defined in the Act.

(b) Furnish to the Union in a timely manner the information requested by the Union on August 14 and August 30, 2000.

(c) Process the grievances filed by the Union on August 30, 2000, on behalf of unit employees.

(d) Within 14 days after service by the Region, post at its Bucks County, Pennsylvania facilities copies of the attached notice marked "Appendix."¹⁹ Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees

¹⁹ If this Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 14, 2000.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES

Posted by the Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid and protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT withdraw recognition from, or refuse to bargain collectively with, District 1199C, National Union of Hospital and Health Care Employees, AFSCME, AFL-CIO as the exclusive bargaining representative of our employees in the following appropriate unit:

All full-time, regular part-time and substitute Resident Advisors II and III employed in the Bucks County, Pennsylvania Division of Horizon House, Inc., excluding all other employees including home coordinators, team coordinators, program specialists, guards and supervisors as defined in the Act.

WE WILL NOT refuse to provide information that is relevant and necessary to the Union as the collective-bargaining representative of unit employees.

WE WILL NOT refuse to process grievances concerning the terms and conditions of employment of bargaining unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, recognize and bargain with the Union as the exclusive bargaining representative of the employees in the above-described appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

WE WILL in a timely fashion furnish the Union with the information requested on August 14, 2000 and August 30, 2000, and thereafter.

WE WILL process the grievances filed by the Union on behalf of bargaining unit employees on August 30, 2000.

HORIZON HOUSE DEVELOPMENTAL SERVICES,
INC.

William E. Slack, Esq. and *Edward Bonett Jr., Esq.*, for the General Counsel.

Guy Vilim, Esq., of Philadelphia, Pennsylvania, for the Respondent-Employer.

Gail Lopez-Henriquez, Esq., of Philadelphia, Pennsylvania, for the Charging Party.

DECISION

STATEMENT OF THE CASE

BRUCE D. ROSENSTEIN, Administrative Law Judge. This case was tried before me on May 9, 2001, in Philadelphia, Pennsylvania, pursuant to a complaint and notice of hearing (the complaint) issued by the Regional Director for Region 4 of the National Labor Relations Board (the Board) on February 23, 2001. The complaint, based upon a charge filed on October 2, 2000,¹ by District 1199C, National Union of Hospital and Health Care Employees, AFSCME, AFL-CIO (the Charging Party or Union) alleges that Horizon House Developmental Services, Incorporated (the Respondent or Employer) has engaged in certain violations of Section 8(a)(1) and (5) of the National Labor Relations Act (the Act). The Respondent filed a timely answer to the complaint denying that it has committed any violations of the Act.

ISSUES

The complaint alleges that the Respondent refused to begin negotiations for a new collective-bargaining agreement in violation of Section 8(a)(1) and (5) of the Act. In addition, the complaint alleges that the Respondent did not furnish certain information to the Union and refused to process a number of grievances. The Respondent defends its refusal to negotiate, provide information and process grievances due to its good-

¹ All dates are in 2000, unless otherwise indicated.

faith doubt that the Union no longer represents a majority of the bargaining unit employees.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Charging Party (joins in the General Counsel's brief), and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a corporation engaged in providing health care and related services to the mentally disabled, with an office and place of business located in Philadelphia, Pennsylvania, where it annually received gross revenues in excess of \$250,000 and purchased and received at its office goods valued in excess of \$5000 directly from points outside the Commonwealth of Pennsylvania. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

On July 3, 1997, the Union was certified as the exclusive collective-bargaining representative of the unit.² The parties entered into their first collective-bargaining agreement effective by its terms from December 21, 1998, through September 30. On or about June 8, the Union requested Respondent to begin negotiations for a new collective-bargaining agreement. Although the parties attempted to schedule negotiations for a successor agreement, no such negotiations occurred prior to or after the termination of the agreement on September 30. Before the expiration of the agreement, the Union on August 14 requested three items of information to assist it in negotiating the successor agreement (GC Exh. 10). Additionally, on August 30, the Union requested the "Leave/Bank" policy referred to in article 19 of the parties' agreement to prepare for negotiations and also filed three class action grievances dealing with work schedules and supervisors performing bargaining unit work (GC Exh. 11). By letter dated September 6, Respondent requested the Union to provide specifics of when certain contract violations occurred in response to the three grievances and informed the Union that the information request for the "Leave/Bank" had been referred to its attorney (GC Exh. 12).

On October 2, the Respondent distributed a memorandum to all bargaining unit employees regarding the status of the Union³

² The appropriate unit is "All full-time, regular part-time and substitute Resident Advisors II and III employed in the Bucks County, Pennsylvania, Division of Horizon House, Inc., excluding all other employees including home coordinators, team coordinators, program specialists, guards and supervisors as defined in the Act."

³ The memorandum states in pertinent part: "Things may get noisy around her soon, and I wanted to let you know why. Most of you know that there is a union that is supposed to represent employees working in our Bucks County CLA programs. A few of you now pay dues to that union. All of you have recently been told that you must sign dues cards. There seems to be some confusion who the union is and what

(R. Exh. 1). On October 11, the Respondent filed a RM petition with the Board (GC Exh. 4). By letter dated February 23, 2001, the Board dismissed the RM petition.⁴ The Respondent did not file an appeal. The General Counsel noted on the record that it has filed a 10(j) petition in United States Federal District Court concerning the Respondent's refusal to commence negotiations for a successor agreement and its withdrawal of recognition from the Union effective October 2.

At all material times Rita Kucsan is the director of human resources for the Respondent, Betti Jo Murphy serves as program director and Barbara Rossi, and Erica Mount hold the position of home coordinator. Maureen Bendig, an employee of the Union, holds the position of administrative organizer and principally serves as the union representative for employees of the Respondent. Traci Thompson held the position of Union delegate until January 1, however, after that date she has been routinely designated by the Union to serve in the capacity of an employee witness representing employees in disciplinary investigations conducted by the Respondent (GC Exh. 31). In August 2000, Thompson was elected by the Union to serve as one of the two employee representatives on the negotiating committee.

B. Position of the Parties

The General Counsel argues that the Respondent has violated Section 8(a)(1) and (5) of the Act by its refusal to negotiate over a successor agreement and its failure to provide information and process grievances filed by the Union.

The Respondent admits that it did not engage in negotiations for a successor agreement and did not provide information or process the three class action grievances submitted by the Union. Respondent defends its conduct and argues that it was privileged to withdraw recognition from the Union based on its good faith doubt that the Union has lost the support of the majority of the bargaining unit employees.⁵ In regard to the Un-

they are supposed to be doing. In fact, as far as we can tell, most of you would rather not have a union at all and are completely happy to be left alone about the issue. Because of this, beginning October 2, 2000, Horizon House will try to have the union decertified. We do this because we want each of you to have the right to decide for yourselves, now, if you want to have a union or not. Horizon House cannot decide this—we cannot decide to keep the union or not to keep it, only you can."

⁴ The letter stated in pertinent part: As a result of the investigation, I find that further proceedings are unwarranted. In Case 4-CA-29830, a complaint issued alleging that the Employer violated Sec. 8(a)(1) and (5) of the Act by refusing to bargain with the Union. A hearing is scheduled before an administrative law judge of the Board. In view of the Employer's failure to comply with its statutory bargaining obligation, no question concerning representation may be raised at this time. *Big Three Industries*, 201 NLRB 197 (1973), *enfd.* 497 F.2d 43 (5th Cir. 1974). Accordingly, I am dismissing the petition, subject to reinstatement, if appropriate, upon application by the Employer after disposition of the unfair labor practice proceeding.

⁵ The Respondent bases its good faith doubt on the following factors:

1. The parties' collective-bargaining agreement expired on September 30.
2. The vast majority of bargaining unit employees have refused to authorize the collection of dues by the Union, even after being told by the Union that they could be fired for failing to do so. Indeed, the Union has never exercised the Union Security provi-

ion's request for information, the Respondent asserts that it was exclusively sought for the purpose of commencing negotiations on a successor agreement. Since the Respondent has no obligation to negotiate for a successor agreement, it did not have an obligation to provide information to the Union. Concerning the refusal to process the class action grievances, the Respondent argues that it responded to the Union and sought additional information in order to conduct an investigation of the grievances. It also notes that the Union did not elevate the grievances to the next step of the grievance procedure as provided for in the parties' agreement.

C. Facts

Kucsan credibly testified that immediately after Thompson's resignation as Union delegate on January 1, she sent a letter to Bendig apprising her that she would send future notices concerning discipline or other working conditions to the Union. Kucsan noted in her testimony that from the inception of the Union's 1997 certification, there was a high rate of employee turnover that approximated 25–30 percent yearly, and that she was aware that less than a majority of the bargaining unit employees paid dues to the Union.

Shortly after Thompson resigned as the on-site union representative, Kucsan and Thompson had a telephone conversation. During that conversation, Thompson apprised Kucsan that the employees did not want the Union and a petition was being distributed among the employees to remove the Union as the bargaining representative. Thompson also informed Kucsan that the Union did not make a difference, it wasn't worth paying the union dues for the representation that was given, and it was hard to get hold of the union representatives.

Murphy testified that in April 2000, she had a telephone conversation with Thompson wherein Thompson told her that we are putting together a document because we no longer want the Union. Murphy immediately informed Kucsan of this conversation and told her that she believed the employees wanted to get rid of the Union. Several months later, sometime in the summer of 2000, Murphy had a second telephone conversation with Thompson. During this conversation, Thompson informed Murphy that the employees mistakenly submitted a document to the Union rather than the Board that they no longer wanted to be represented by the Union.

sions of its agreement to seek the termination of an employee for the failure to pay required dues (GC Exh. 3, art. 2, sec. 2.4).

3. The Union convened two meetings in August 2000 of bargaining unit employees to determine if the employees desired to have the Union continue as the bargaining representative. Of the 22/23 employees in the bargaining unit, only 3 employees attended the first meeting and 10 employees attended the second meeting.

4. Since January 1, the Union has not had an elected delegate to represent the bargaining unit employees on-site.

5. During the term of the parties' collective-bargaining agreement, a large number of employees have declined union representation at disciplinary investigatory meetings.

6. During informal contacts between bargaining unit employees and supervisors, employees have routinely complained that the Union does not respond to requests for information or assistance and employees have stated to supervisors that they do not know why they have a union and do not support the presence of a union.

In July 2000, Kucsan testified that Thompson asked her how to file a complaint against the Union because the employees were paying dues to the Union but not getting any results. Kucsan instructed Thompson to contact the Board and provided the telephone number of the Philadelphia office.

House Coordinator Rossi testified that several staff members came to her and expressed dissatisfaction concerning their efforts to contact the Union. In this regard, in July 2000, bargaining unit employee Lucy Morrison informed her that she tried to contact the Union several times but she gave up because she could not get hold of anybody. Employee Karen DiVenno told Rossi that the Union was not necessary and that she was opposed to the Union. Additionally, DiVenno informed Rossi that she attempted to contact the Union a number of times but nobody got back to her. Lastly, employee Tanisha Moore apprised Rossi that it was not fair that she was paying dues to the Union while others in her peer group were not contributing to the Union.

House Coordinator Mount testified that employee's Thompson and Arthur Garglahn complained to her about the necessity of paying dues and not being represented by the Union. Additionally, a number of staff members complained to Mount about experiencing trouble in getting in contact with the Union. Mount also testified that it was her belief that the Union did not represent a majority of the bargaining unit due to a number of employees not knowing about the Union and their failure to request union representation at disciplinary investigatory meetings.

Between July and September 30, Respondent held four supervisory meetings wherein the status of the Union was discussed. All of the above supervisors shared common information about the Union and discussed telephone and personal conversations they had with bargaining unit employees concerning the Union. A consensus was reached that the employees no longer wanted the Union as its bargaining representative and it was apparent to the supervisors that the Union no longer represented a majority of the employees. Accordingly, the Respondent determined to withdraw recognition from the Union on October 2, the first workday after the parties' collective-bargaining agreement expired. It also provided a memorandum to all employees on October 2, about the status of the Union and Respondent's position that the Union should be decertified (R. Exh. 1).

The record demonstrates that both parties adhered to the provisions of the agreement during its term. In this regard, information requests were processed (GC Exh. 8 and 9, R. Exh. 2), grievances were submitted and acted upon (GC Exh. 30, 31, and 32), and disciplinary investigatory meetings were held and attended by Union representatives (GC Exh. 15, 16, and 17). Indeed, in certain circumstances, after the expiration of the parties' agreement on September 30, the Union was invited to and attended disciplinary investigatory meetings.

D. Analysis

1. Refusal to bargain

In *Allentown Mack Sales & Service v. NLRB*, 522 U.S. 359 (1988), the Supreme Court addressed the Board's good-faith

doubt standard. The Court held that the Board's "good-faith doubt" standard must be interpreted to permit the employer to act where it has a "reasonable uncertainty" of the union's majority status, rejecting the Board's argument that the standard required a good-faith disbelief of the union's majority support.⁶

In order to establish good-faith reasonable uncertainty, employers may present antiunion petitions signed by unit employees and firsthand statements by employees concerning personal opposition to an incumbent union. Likewise, employers may submit unverified statements regarding other employees' anti-union sentiments and employees' statements expressing dissatisfaction with the union's performance as the bargaining representative.⁷

In *Henry Bierce Co.*, 328 NLRB 646 (1999), the Board found that certain factors that the employer relied on in withdrawing recognition—newly hired employees' failure to join the union, some employees' failure to authorize dues checkoff, and the union's failure to file grievances (absent knowledge of the employer's breaches of contract), appoint a steward, or submit a tentative agreement to the employees for ratification—were insufficient to engender a good-faith uncertainty.

In the subject case, the Respondent argues that it lawfully withdrew recognition from the Union when the contract expired and under *Allentown Mack* was not required to negotiate a successor contract.⁸ Here, the record demonstrates that the Respondent did continue to observe the terms of the contract and that it did not withdraw recognition until after the contract expired.⁹

⁶ On March 29, 2001, the Board issued its decision in *Levit Furniture Co.*, 333 NLRB 717. It determined that after careful consideration, there are compelling legal and policy reasons why employers should not be allowed to withdraw recognition merely because they harbor uncertainty or even disbelief concerning unions' majority status. The Board held that an employer may unilaterally withdraw recognition from an incumbent union only where the union has actually lost the support of the majority of the bargaining unit employees. It overruled *Celanese Corp.*, 95 NLRB 664 (1951), and its progeny insofar as they permit withdrawal on the basis of good-faith doubt. The Board stated, however, that it shall not apply the new withdrawal of recognition standard in pending cases. Accordingly, the subject case will be evaluated under the *Allentown Mack* reasonable uncertainty standard.

⁷ The Board continues to disregard turnover among employees in the bargaining unit. Indeed, it adheres to the established presumption that newly hired employees support the union in the same proportion as the employees they have replaced. *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 779 (1990). Likewise, the Board disregards indications of union inactivity, such as failing to appoint stewards or to file grievances, unless they are the subject of employees' complaints.

⁸ If an employer establishes a good-faith doubt (uncertainty) as to the union's continued majority support within a reasonable time before the contract expires, the employer may lawfully refuse to negotiate a successor contract and announce that it will not recognize the union when the contract expires, provided it complies with the existing agreement.

⁹ Bendig admitted that the Respondent did not withdraw recognition during the term of the agreement. Likewise, she acknowledged that the Respondent complied with the provisions of their agreement concerning grievance processing, responding to requests for information and permitting union representatives to attend disciplinary meetings representing bargaining unit employees.

Under these circumstances, the allegations in paragraph 6 of the complaint that the Respondent refused to bargain with the Union for a new collective-bargaining agreement must be dismissed if the Respondent lawfully withdrew recognition from the Union.

Turning to the Respondent's affirmative defense that it lawfully withdrew recognition from the Union based on its good-faith uncertainty concerning the Union's majority support, I find that it was privileged to do so for the following reasons. Both Kucsan and Murphy credibly testified that in separate telephone conversations with Thompson, they were informed that the employees no longer wanted the Union to represent them and the employees were circulating a memorandum to this effect that was mistakenly filed with the Union instead of the Board.¹⁰ Rossi testified that three individual employees (Morrison, DiVenno, and Moore) apprised her that the Union was not necessary, that the employees were not getting representation and it is not fair to be required to pay dues and not receive representation. Likewise, Mount testified that two other employees (Thompson and Garglahn) complained to her that they were upset about paying dues and not being able to contact the Union. Significant in my determination that the Respondent's action in withdrawing recognition was privileged, was the General Counsel and Charging Party's failure to call Thompson to rebut the testimony of Kucsan, Murphy, and the other supervisors that the employees no longer desired the Union to represent them. Likewise, no other bargaining unit employees were called by the General Counsel or the Charging Party to testify that a petition was not circulated among employees that they no longer wanted the Union to represent them. Additionally, no employees were called to testify that they did not inform Respondent supervisors that they were dissatisfied with the Union and found their representation lacking in many areas. While the Respondent presented additional evidence to buttress their reasons for withdrawing recognition from the Union including employee turnover, failure to appoint a steward and some employees' failure to authorize dues checkoff, I have not considered those examples in reaching my conclusions relying on Board precedent that rejects such evidence. Rather, I find that the firsthand statements by employees concerning personal opposition to the Union to be conclusive evidence that contributed to the Employer's good-faith uncertainty in this case. Therefore, I conclude that the Respondent was privileged to withdraw recognition from the Union after the expiration of the parties' agreement on September 30. Thus, I also find that the allegations in paragraph 6 of the complaint must be dismissed.

2. Refusal to provide information

The General Counsel alleges in paragraph 7 of the complaint that the Respondent on August 14 and 30 refused to furnish certain information to the Union.

¹⁰ Thompson, unlike the employee in *Scepter Ingot Casting, Inc.*, 331 NLRB 1509 (2000), who told an employer that she did not feel employees continued to desire representation, previously held the position of union delegate (steward) and was the spokesperson for the bargaining unit employees. Moreover, Thompson informed two independent management representatives that the employees no longer wanted or needed the Union to represent them.

Since the Union requested the information in order to prepare for negotiations for a successor agreement (GC Exh. 10 and 11), and I have determined that the Respondent under *Allentown Mack* had no obligation to negotiate a successor agreement, I recommend that the allegations concerning a refusal to provide information be dismissed.

3. Refusal to process grievances

The General Counsel alleges in paragraph 8 of the complaint that the Respondent since August 30 has refused to process three class action grievances.

The record demonstrates that on September 6, Respondent responded to the Union and requested that it provide specifics of when contract violations have occurred. Bendig admitted that the Union did not respond to this request. Likewise, it did not elevate the grievances to the next step of the grievance procedure. The parties' agreement, however, permits the Union to elevate the grievance even if the Employer does not answer a grievance.¹¹ Under the particular circumstances of this case, I

¹¹ Sec.14.2 of the parties' agreement (GC Exh. 3), states: "Failure on the part of the Employer to answer a grievance at any step shall be

find that the Respondent's September 6 response, coupled with the Union's failure to elevate the grievances to the next step in the procedure precludes a finding that the Respondent violated Section 8(a)(1) and (5) of the Act. Accordingly, I recommend that the allegations in paragraph 8 of the complaint be dismissed.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Respondent did not engage in violations of Section 8(a)(1) and (5) of the Act by refusing to negotiate for a new collective bargaining agreement, refusing to provide information and refusing to process grievances.

[Recommended Order for dismissal omitted from publication.]

considered a denial by the Employer and shall allow the employee to proceed to the next step." Additionally, Bendig acknowledged that the Respondent corrected one of the three grievances shortly after it was filed.